9 FAM 40.41
NOTES

(CT:VISA-2002; 06-18-2013)
(Office of Origin: CA/VO/L/R)

9 FAM 40.41 N1 BACKGROUND

(CT:VISA-1995; 06-06-2013)

Several pieces of legislation changed the "public charge" provisions of the law:

(1) The Welfare Reform Act (officially The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Public Law 104-193 of August 22, 1996) added a new section, INA 213A, to the Immigration and Nationality Act (INA), which provides for legally binding affidavits of support (AOS) for the purpose of meeting the public charge requirements of INA 212(a)(4);

(2) The Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208 of September 24, 1996 amended INA 212(a)(4) to require that an INA 213A-compliant AOS be submitted for all family-based immigrant visa applications (other than self-petitions) and for certain employment-based immigrant visa applicants; and

(3) Subsequent amendments to the Welfare Reform Act Public Law 105-33, which restricted the public benefits previously available to most aliens in the United States, thus affecting the scope of public charge.

(4) The Violence Against Women Reauthorization Act of 2013 (8 U.S.C. 1367, Public Law 113-4) states that INA 212(a)(4)(A) does not apply to an alien who is a VAWA self-petitioner, is an applicant for a U nonimmigrant visa, or who is an alien described in section 431(c) of the Personal Responsibility and Work Opportunity Act of 1996.

9 FAM 40.41 N2 DEFINITION OF "PUBLIC CHARGE"

(CT:VISA-1931; 10-10-2012)

a. For the purpose of determining inadmissibility under INA 212(a)(4) (8 U.S.C. 1182(a)(4)), the term "public charge" means that an alien, after admission into the United States, is likely to become primarily dependent on the U.S. Government for subsistence. This means either:

(1) The receipt of public cash assistance for income maintenance (see 9 FAM 40.41 N2.1 below); or

(2) Institutionalization for long-term care at U.S. Government expense (see 9 FAM 40.41 N2.3). Short-term confinement in a medical institution for rehabilitation does not constitute primary dependence on the U.S. Government for subsistence.

b. When considering the likelihood of an applicant becoming a "public charge," you must take into account, at a minimum, the factors specified in INA 212(a)(4)(B) (see 9 FAM 40.41 N5) (in addition to the Form I-864, Affidavit of Support Under Section 213A of the Act, or Form I-134, Affidavit of Support in cases which require these forms), in order to base your determination on the totality of the alien's circumstances at the time of visa application.

c. USCIS states that "in determining whether an alien meets the definition for public charge inadmissibility, a number of factors are considered, including age, health, family status, assets, resources, financial status, education, and skills. No single factor, other than the lack of an affidavit of support, if required, will determine whether an individual is a public charge." (USCIS, Public Charge Fact Sheet, April 29, 2011.)

9 FAM 40.41 N2.1 Defining "Public Cash Assistance"

(CT:VISA-1931; 10-10-2012)

a. In the "public charge" context, "public cash assistance" for income maintenance includes:

(1) Supplemental security income (SSI);

(2) Cash temporary assistance for needy families (TANF), but not including supplemental cash benefits or any non-cash benefits provided under TANF; and

(3) State and local cash assistance programs that provide for income maintenance (often called "general assistance").

b. These types of assistance are sometimes also referred to as "means tested benefits." See 9 FAM 40.41 N11.

9 FAM 40.41 N2.2 Benefits Not Considered "Public Cash Assistance for Income Maintenance"

(CT:VISA-1931; 10-10-2012)

a. There are many forms of U.S. Government assistance that an alien may have accepted in the past, or that you may reasonably believe an alien might receive after admission to the United States, that are of a non-cash and/or supplemental nature and would not create an inadmissibility under INA

212(a)(4). Certain programs are funded with public funds for the general good, such as public education and child vaccination programs, etc., and are not considered to be benefits for the purposes of INA 212(a)(4) (8 U.S.C. 1182(a)(4)). Although the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 prohibits aliens from receiving many kinds of public benefits, it specifically exempts from this prohibition several of the public benefits indicated below. Neither the past nor possible future receipt of such non-cash or supplemental assistance may be considered in determining whether an alien is likely to become a public charge. As discussed at INA 213A, Note 1, these benefits that are not to be considered as public cash assistance or income include, but are not limited to:

(1) The Food Stamp Program;

(2) The Medicaid Program (other than payments under Medicaid for long-term institutional care);

(3) The Child Health Insurance Program (CHIP);

(4) Emergency medical services;

(5) The Women, Infants and Children (WIC) Program;

(6) Other nutrition and food assistance programs;

(7) Other health and medical benefits;

(8) Child-care benefits;

(9) Foster care;

(10) Transportation vouchers;

(11) Job training programs;

(12) Energy assistance, such as the low-income home energy assistance program (LIHEAP);

(13) Educational assistance, such as Head Start or aid for elementary, secondary, or higher education;

(14) Job training;

(15) In-kind emergency community services, such as soup kitchens and crisis counseling;

(16) State and local programs that serve the same purposes as the Federal in-kind programs listed above; and

(17) Any other Federal, State, or local program in which benefits are paid in-kind, by voucher or by any means other than payment of cash benefits to the eligible person for income maintenance.

b. In all cases, the underlying nature of the program reveals whether it is considered a "public charge." The Consular Officer should be able to determine that the purpose of such benefits is not “income maintenance.” Some

programs which provide cash benefits for special purposes are supplemental and not for income maintenance. They include such help as transportation or child care benefits paid in cash, or one-time emergency payments made under TANF to avoid the need for on-going cash assistance.

c. Cash benefits that have been earned (e.g., social security payments, old age survivors disability insurance (OASDI), U.S. Government pension benefits, and veterans benefits) are not considered public cash assistance for the purposes of a public charge determination under INA 212(a)(4).

9 FAM 40.41 N2.3 "Institutionalization for Long Term Care"

(CT:VISA-1931; 10-10-2012)

a. For INA 212(a)(4) purposes, "institutionalization for long-term care" refers to care for an indefinite period of time for mental or other health reasons, rather than temporary rehabilitative or recuperative care even if such rehabilitation or recuperation may last weeks or months.

b. In addition, USCIS notes that "public assistance, including Medicaid, that is used to support aliens who reside in an institution for long-term care – such as a nursing home or mental health institution – may be considered as an adverse factor in the totality of the circumstances for purposes of public charge determinations. Short-term institutionalization for rehabilitation is not subject to public charge consideration." See USCIS, Public Charge Fact Sheet, April 29, 2011.

9 FAM 40.41 N3 ALIENS EXEMPT FROM INA 212(A)(4)

(CT:VISA-1995; 06-06-2013)

The following visa classes are exempt from INA 212(a)(4):

(1) Nonimmigrants who qualify under INA 101(a)(15)(A) or (G), who are exempt from the public charge provisions of the law under INA 102 (other than those classifiable as A-3 or G-5);

(2) Nonimmigrants who qualify under INA(a)(15)(T);

(3) Nonimmigrants who qualify under INA(a)(15)(U);

(4) VAWA self-petitioners; and

(5) Qualified aliens described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641(c)).

9 FAM 40.41 N4 APPLYING INA 212(A)(4) TO IMMIGRANT VISA APPLICANTS

9 FAM 40.41 N4.1 Determining Public Charge Inadmissibility

(CT:VISA-1995; 06-06-2013)

a. INA 212(a)(4) (8 U.S.C. 1182(a)(4)) applies to all aliens seeking entry into the United States, with a few exceptions (see 9 FAM 40.41 N3). With respect to immigrant visa applicants, the amount and type of evidence generally required is much greater than that required in a nonimmigrant case. In all cases, however, you must base the determination of the likelihood that the applicant will become a public charge on a reasonable future projection of the alien's present circumstances. You may not refuse a visa on the basis of "what if" type considerations (e.g., "what if the applicant loses the job before reaching the intended destination," or "what if the applicant is faced with a medical emergency."). Instead, you must assess only the "totality of the circumstances" existing at the time of visa application. (See 9 FAM 40.41 N5 below.) In short, you must be able to point to circumstances which make it not merely possible, but likely, that the applicant will become a public charge, as defined in 9 FAM 40.41 N2, above.

b. It is possible, however, for an applicant to show he or she is not likely to become a public charge and yet be found inadmissible under INA 212(a)(4) because of the 1996 amendment to that provision. Specifically, an applicant subject to the requirement for a specific type of affidavit of support (AOS), such as an I-864, must have such an AOS, regardless of any or all other circumstances. Therefore, if the relative petitioner of such an applicant does not, or cannot, properly execute a Form I-864, Affidavit of Support under Section 213A of the Act, that applicant must be considered ineligible for a visa and the visa application should then be refused. See 9 FAM 40.41 N13.

c. Additionally, applicants who are not required to submit the Form I-864 must still be found not to be ineligible under INA 212(a)(4) in light of the totality of their circumstances.

9 FAM 40.41 N4.2 Applicants Who Are Required to Submit Form I-864

(CT:VISA-1995; 06-06-2013)

a. Applicants in any of the following immigrant categories must present Form I-864, Affidavit of Support Under Section 213A of the Act, properly executed in compliance with INA 213A, in order to establish their eligibility under INA 212(a)(4):

(1) Immediate relatives, including:

(a) Spouse of a U.S. citizen;

(b) Parent of a U.S. citizen;

(c) Child of a U.S. citizen (including adopted orphans unless the orphan would become a citizen upon lawful admission as an immigrant pursuant to section 320 of the Act); (See 9 FAM 40.41 N4.4-1); and

(d) K nonimmigrants adjusting to lawful permanent resident (LPR) status (See 9 FAM 40.41 N12.6).

NOTE: Certain children classified Immediate Relative (IR-2 or IR-3) do not need Form I-864 (see 9 FAM 40.41 N4.4-1).

(2) Family-based preference applicants, including:

(a) Unmarried sons and daughters of U.S. citizens (F1);

(b) Spouses, children, and unmarried sons and daughters of permanent resident aliens (F2A/F2B);

(c) Married sons and daughters of U.S. citizens (F3); and

(d) Brothers and sisters of U.S. citizens (F4).

(3) Certain employment-based preference applicants including:

(a) Beneficiary of a petition filed by a U.S. citizen or LPR alien relative who is the sole proprietor of the business filing the petition; or

(b) A beneficiary of a petition filed by an entity in which a U.S. citizen or LPR relative of the alien has a 5 percent or greater ownership interest. (Note that in such cases, the petitioning entity cannot file Form I-134, Affidavit of Support, but must show intent to honor the employment offer.) The citizen or LPR relative of the applicant to be employed by the petitioning entity must file Form I-864 on behalf of the applicant; and/or

(c) An accompanying or following-to-join family member of such immigrants, but only if the principal applicant, at the time of his or her entry, was required to submit Form I-864.

b. The term "relative" has been defined by 8 CFR 213a.1 to mean a husband, wife, father, mother, child, adult son or daughter, or brother or sister. Also see 9 FAM 40.41 N6.3.

9 FAM 40.41 N4.3 Effect of Form I-864 on Public Charge Determinations

(CT:VISA-1995; 06-06-2013)

A properly filed, non-fraudulent Form I-864, Affidavit of Support Under Section 213A of the Act, should normally be considered sufficient to overcome the INA 212(a)(4) requirements. In determining whether the INA 213A requirements creating a legally binding affidavit have been met, the credibility of an offer of support from a person who meets the definition of a sponsor and who has verifiable resources is not a factor - the affidavit is enforceable regardless of the sponsor's actual intent and the sponsor's actual intent should not be considered by you, unless there are significant other public charge concerns relating to the specific visa case, such as if the applicant is of advanced age or has a serious medical condition. If you have concerns about whether a particular Form I-864 may be "fraudulent", you should contact CA/FPP for guidance.

9 FAM 40.41 N4.4 Applicants Who Are Not Required to Submit Form I-864

9 FAM 40.41 N4.4-1 Certain IR-2 and IR-3 Applicants who Benefit from the Child Citizenship Act

(CT:VISA-1995; 06-06-2013)

a. Public Law 106-395 (The Child Citizenship Act of 2000) went into effect on February 27, 2001. The Act amended INA 320 (8 U.S.C. 1431) to confer automatic citizenship upon certain categories of children born abroad upon their admission to the United States as lawful permanent residents (LPRs). Because the obligations that INA 213A imposes on a sponsor who executes a Form I-864 terminate when the sponsored alien acquires citizenship, Form I-864 should not be required for those categories of immigrants who will acquire citizenship immediately upon admission to the United States.

b. Instead, the intending immigrant (or U.S. citizen parent if the immigrant is under 14 years of age) must file Form I-864-W, Intending Immigrant's Affidavit of Support Exemption. Although such a visa applicant is still subject to the public charge provisions of INA 212(a)(4) even without an I-864 affidavit of support requirement, the public charge concern will no longer apply to the applicant once the immigrant acquires citizenship. You should consider the applicant's likely acquisition of citizenship immediately upon admission to the United States when you determine whether the applicant is likely to become a public charge at any time while in the United States as an alien. (See 9 FAM 40.41 N4.4-3 b.)

c. An intending immigrant must submit the Form I-864-W, instead of Form I-864, to establish that the intending immigrant is not required to submit the Form I-

864 where he or she is the child of a U.S. citizen and will acquire citizenship under Section 320 of the Act if the application for admission as an immigrant or adjustment of status is approved.

d. Form I-864 is, therefore, not required in any case in which the visa applicant qualifies for automatic citizenship under Section 320 of the Act upon admission. That would include the following categories of immigrants:

   (1) Orphan classified IR-3, provided the child will be admitted to the United States while still under age 18 and will be residing permanently in the United States in the legal and physical custody of the adoptive U.S. citizen parent as of the time of admission;

   (2) Adopted child classified IR-2 who meets the requirements of INA 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)), provided the child will be admitted to the United States while under age 18 and will be residing permanently in the United States in the legal and physical custody of the adoptive U.S. citizen parent as of the time of admission; and

   (3) Child classified IR-2 (born in or out of wedlock) to a parent who is now a U.S. citizen, provided the child will be admitted to the United States while still under age 18 and will be residing permanently in the United States in the legal and physical custody of the U.S. citizen parent as of the time of admission.

e. Except as explained in 9 FAM 40.41 N4.4-1, the Form I-864, Affidavit of Support under Section 213A of the Act, is required for all other family-based immigrants, including biological and adopted children of U.S. citizens who are not eligible for automatic naturalization upon admission as a legal permanent resident (LPR). Form I-864 is therefore required for:

   (1) An alien classified IR-2 based on a stepparent and/or stepchild relationship with a U.S. citizen;

   (2) An alien classified IR-2 or IR-3 who will be age 18 or over upon admission to the United States as an LPR;

   (3) An alien classified IR-2 or IR-3 who will not be residing in the United States in the legal and physical custody of the U.S. citizen parent at the time of lawful admission; or

   (4) An alien classified IR-4 orphan to be adopted in United States by a U.S. citizen.

f. In any case such as these in which the visa applicant qualifies for automatic citizenship under Section 320 of the Act upon admission, and the I-864 requirement turns solely on whether the visa applicant will immediately qualify for U.S. citizenship upon admission to the United States as an LPR, if posts have questions in this area posts should first seek guidance from Consular Affairs/Overseas Citizens Services (CA/OCS) on the citizenship issue. If CA/OCS advises that the applicant will acquire U.S. citizenship at the moment

of admission at the port of entry (POE), and not at any later point; then the applicant is exempt from the Form I-864 requirement, but the applicant instead should file the Form I-864-W.

g. In cases involving immigrant visa applicants who will be acquiring citizenship upon admission, pursuant to INA 320 it is unlikely in the absence of unusual circumstances that the individual will become a public charge while still an alien prior to naturalization. For adoption cases, you should also keep in mind that the Department of Homeland Security (DHS) does not approve Form I-600, Petition to Classify Orphan as an Immediate Relative, or Form I-600-A, Application for Advance Processing of Orphan Petition, unless satisfied that the petitioners are capable of supporting the child.

9 FAM 40.41 N4.4-2 Aliens With 40 Quarters of Work Under the Social Security Act (SSA)

(CT:VISA-1995; 06-06-2013)

a. The requirement for visa petitioners to submit Form I-864:

(1) Terminates once the sponsored alien has worked in the U.S. in a job covered under Title II of the Social Security Act (SSA); and

(2) Can be credited with 40 qualifying quarters of coverage under Title II of the SSA.

Therefore, you must waive the Form I-864 requirement if the alien can demonstrate 40 quarters of work under the SSA. (See 9 FAM 40.41 PN3 for procedures to follow in such cases.) Post should advise immigrant visa (IV) beneficiaries seeking to demonstrate 40 quarters of the SSA coverage to submit Form I-864-W and to attach an earnings and benefits statement from the SSA. To obtain an earnings and benefits statement from SSA, immigrant visa (IV) applicants should complete Form SSA-7004-SM, Request for Social Security Statement. Individuals in the United States can obtain this form by calling SSA's toll-free number, 1-800-772-1213.

b. The term "quarter" means:

(1) The three-calendar-month period ending on March 31, June 30, September 30, or December 31 of any year;

(2) Quarters of coverage are obtained by working at a job or as a self-employed individual, earning a specified minimum income, and making Social Security payments on the earnings; and

(3) Quarters are calculated based on the amount of income earned during the course of the year, rather than the actual number of days worked within a given quarter.

c. Every year the SSA establishes the requisite per quarter minimum income. Any individual earning three times this established amount during the calendar

year, for example, would be credited with three quarters of coverage, even if the individual worked for only one month. The sponsored immigrant is not to be credited with any quarter beginning after December 31, 1996 during which the sponsored immigrant received any Federal means-tested public benefit.

d. INA 213A(a)(3)(B) states that, in determining the number of qualifying quarters of coverage under title II of the Social Security Act, an alien is to be credited with:

   (1) All of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18; and

   (2) All of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

e. A parent-child relationship need not have existed when the parent worked the 40 quarters. For example, an alien can claim those quarters that the parent worked prior to the alien's birth or adoption.

f. If the intending immigrant has or can be credited with 40 quarters of coverage under the Social Security Act, and thus is not required to file an I-864, the applicant should file the I-864W instead.

9 FAM 40.41 N4.4-3 Other Aliens Exempt from the Form I-864 Requirement

(CT:VISA-1995; 06-06-2013)

a. The I-864 requirement does not apply to employment-based visa cases other than those described in 9 FAM 40.41 N4.2 paragraph a(3) (those involving a relative who is a U.S. citizen or Legal Permanent Resident.) Thus, if the I-864 is not required of the principal applicant in these employment-based cases, the accompanying or follow to join aliens are similarly not required to file the I-864.

b. The I-864 is not required for Diversity Immigrants (DV applicants) or returning resident (SB) applicants.

c. The I-864 is not required for self-petitioning widows or widowers; or the battered spouse or child of a U.S. citizen who have an approved I-360 special immigrant petition. However, these applicants must file the I-864W, Intending Immigrant’s Affidavit of Support Exemption.

d. The I-864 is not required for K visa applicants. However, such applicants will have to submit Form I-864 to DHS/USCIS at the time of adjustment of status to that of a lawful permanent resident (LPR). See 9 FAM 40.41 N12.6.

9 FAM 40.41 N5 DETERMINING "TOTALITY OF THE CIRCUMSTANCES"

(CT:VISA-1995; 06-06-2013)

a. In making a determination regarding an alien's admissibility under INA 212(a)(4), you must consider, at a minimum, the alien's:

(1) Age;

(2) Health;

(3) Family status;

(4) Assets;

(5) Financial status and resources; and

(6) Education or skills.

b. These factors, and any other factors thought relevant by an officer in a specific case, will make up the "totality of the circumstances" that you must consider when making a public charge determination. As noted in 9 FAM 40.41 N4.2, a properly filed, non-fraudulent Form I-864, Affidavit of Support Under Section 213A of the Act, in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the "totality of the circumstances" analysis. Nevertheless, the factors cited above could be given consideration in an unusual case in which a Form I-864 has been submitted and should be considered in cases where Form I-864 is not required.

9 FAM 40.41 N5.1 Consideration of Current or Prior Receipt of Public Assistance

(CT:VISA-1995; 06-06-2013)

a. The public charge provisions of INA 212(a)(4) are generally considered to be forward looking. You must, therefore, base findings of inadmissibility on the likelihood of the applicant becoming a public charge in the future. A finding of inadmissibility under INA 212(a)(4) cannot be based solely on the prior receipt of public benefits. Neither should you base a determination exclusively on even the current receipt of subsistence cash benefits or institutionalization. The determination should always be based upon all available factors. Past or current receipt of cash benefits for income maintenance by a family member of the visa applicant may be factored into the applicant's case only when such benefits also constitute(d) the primary means of subsistence of the applicant.

b. Past or current receipt of other types of benefits, such as those listed in 9 FAM 40.41 N2.2, must not be considered. Further, you should not try to find out whether an alien has previously or is currently receiving benefits such as those listed in 9 FAM 40.41 N2.2.

c. There is no provision in the law to indicate that the receipt of means-tested benefits by the sponsor would, in itself, result in a finding of inadmissibility for the applicant under INA 212(a)(4). The sponsor's reliance on such benefits, however, would clearly be an important factor in considering whether the applicant might have to become a public charge. If the sponsor or any member of his or her household has received public means-tested benefits within the past three years, you must review fully the sponsor's current ability to provide the requisite level of support, taking into consideration the kind of assistance provided and the dates received. You must review carefully Form I-864, Affidavit of Support under Section 213A of the Act, or Form I-134, Affidavit of Support, and all attachments submitted as well as evidence of the sponsor's current financial circumstances, in such cases.

9 FAM 40.41 N5.2 Health

(CT:VISA-1995; 06-06-2013)

You must take into consideration the panel physician's report regarding the applicant's health, especially if there is a prognosis that might prevent or ultimately hinder the applicant from maintaining employment successfully or indicate the likelihood that the alien will require institutionalization.

9 FAM 40.41 N5.3 Family Status

(CT:VISA-1995; 06-06-2013)

You should consider the marital status of the applicant and, if married, the number of dependents for whom he or she would have financial responsibility.

9 FAM 40.41 N5.4 Applicant's Age

(CT:VISA-1995; 06-06-2013)

You should consider the age of the applicant. If the applicant is under the age of 16, he or she will need the support of a sponsor. If the applicant is 16 years of age or older, you should consider what skills the applicant has to make him or her employable in the United States.

9 FAM 40.41 N5.5 Education and Work Experience

(CT:VISA-1995; 06-06-2013)

You should review the applicant's education and work experience to determine if these are compatible with the duties of the applicant's job offer (if any). You should consider the applicant's skills, length of employment, and frequency of job changes. Even if a job offer is not required, you should assess the likelihood of the alien's ability to become or remain self-sufficient, if necessary, within a reasonable time after entry into the United States. (See 9 FAM 40.41 N5.7.)

9 FAM 40.41 N5.6 The Applicant's Financial Resources

9 FAM 40.41 N5.6-1 Aliens Subject to INA 212(a)(4)(C)/(D)

(CT:VISA-1995; 06-06-2013)

An alien who must have Form I-864, Affidavit of Support Under Section 213(A) of the Act, will generally not need to have extensive personal resources available unless considerations of health, age, skills, etc., suggest that the likelihood of his or her ever becoming self-supporting is marginal at best. In such cases, of course, the degree of support that the affiant will be able and likely to provide becomes more important than in the average case.

9 FAM 40.41 N5.6-2 Alternative Evidence of Support in Cases When Form I-864 is Not Required

(CT:VISA-1995; 06-06-2013)

a. An applicant relying solely on personal financial resources for support for him or herself and family members after admission into the United States should be presumed inadmissible for a visa under INA 212(a)(4) unless his or her income (including any to be derived from prearranged employment) will equal or exceed the poverty guideline level for the applicant and accompanying family members. You should refer to 9 FAM 40.41 Exhibit I, Poverty Income Guideline Table, published by the Department of Health and Human Services (HHS).

b. Normally, all accompanying dependent family members and other dependent family members already in the United States are considered to be within the family unit for purposes of applying the poverty income guidelines. However, an applicant seeking to join a lawfully admitted permanent resident and two citizen children in the United States, who are receiving public assistance, may be determined to overcome the public charge provision if the applicant's prospective income will exceed on the poverty income guideline table for a single person. In this instance only, it does not matter that the applicant's prospective income will be below that shown in the poverty income guideline table for a family of four. It is quite possible that the admission of the applicant and the applicant's income in the United States may permit the lowering of the public assistance benefits the family members now receive.

c. You should not rely exclusively on the submission of documents to determine whether an applicant is inadmissible under INA 212(a)(4). Repeated requests for documents in an effort to resolve every small doubt should be avoided. There is a limit to the value of documents in a situation in which the applicant must satisfy the officer of his or her future activities, intentions, and prospects.

d. You should make every effort to inform applicants in advance of the visa interview of the required support documents. You should be in a position to issue or deny the visa under INA 212(a)(4) at the end of the initial visa

interview, assuming that the applicant has made reasonable efforts to submit the evidence originally requested. (For example, in cases where a Form I-864, Affidavit of Support under Section 213A of the Act, is required, an application cannot be considered until that document and related information have been executed and considered satisfactory by you.) Applicants who are not likely to overcome the public charge provision even after the presentation of additional evidence should be refused "under 212(a)(4) instead of 221(g)." Adequate time and effort spent prior to and during the initial interview can save work for the post and the applicant in this respect.

e. An applicant may establish the adequacy of financial resources by submitting evidence of bank deposits, ownership of property or real estate, ownership of stocks and bonds, insurance policies, or income from business investments sufficient to provide for his or her needs, as well as those of any dependent family member, until suitable employment is located. (The amount sufficient will depend on the applicant's age, physical condition, and family circumstances and size.)

   (1) Bank Deposits—Applicants relying on bank deposits to meet the public charge requirements should present as evidence a letter signed by a senior officer of the bank over the officer's title, showing:

      (a) The date the account was opened;

      (b) The number and amount of deposits and withdrawals during the last 12 months;

      (c) The present balance. This information may prevent attempted abuse such as an initial deposit of a substantial sum of money being made within a relatively short time prior to the immigrant visa application; and

      (d) How the money, if in a foreign bank in foreign currency, is to be transferred to the United States.

   (2) Real estate investments—Evidence of property ownership may be in the form of a title deed or equivalent or certified copies. The applicant must satisfy you as to the plans for disposal or rental of such property and the manner in which the income from the property (if abroad) is to be transferred to the United States for the applicant's support.

   (3) Stocks and Bonds—Evidence of income from these sources should indicate present cash value or expected earnings and, if the income is derived from a source outside the United States, a statement as to how the income is to be transferred to the United States.

   (4) Income from business investments; or

   (5) Insurance policies.

f. An applicant may also support a finding that he or she meets the public charge requirements by:

(1) Evidence of employment of a permanent nature in the United States that will provide an adequate income. A certified Labor Department Form ETA-9089, Application for Permanent Employment Certification, or Form ETA-750-Part A & B, Application for Alien Employment Certification, will show this if the applicant is subject to the provisions of INA 212(a)(5)(A). If the labor certification provisions do not apply, the employer may submit a notarized letter of employment, in duplicate, on letterhead stationery attesting to the offer of prearranged employment; or

(2) Assurance of support by relatives or friends in the United States.

(3) Sufficient support from a combination of the above sources.

9 FAM 40.41 N5.6-3 Use of Form I-134, Affidavit of Support

(CT:VISA-1995; 06-06-2013)

a. Form I-134 may be requested by you in any case in which an alien is inadmissible on public charge grounds, but where the I-864 is not required. Section 213 of the INA (not section 213A) permits the admission of any alien who is inadmissible on public charge grounds in the discretion of the Secretary of the Department of Homeland Security or the Attorney General, by the posting of a bond, or by another undertaking. The I-134 is considered to be another such undertaking.

b. Because INA 212(a)(4)(C) and INA 213A require the use of Form I-864 for so many classes of immigrants, the use of Form I-134, Affidavit of Support, has been reduced considerably. Nevertheless, there still are circumstances when Form I-134 will be beneficial. This affidavit, submitted by the applicant at your request, is not legally binding on the sponsor and should not be accorded the same weight as Form I-864. Form I-134 should be given consideration as one form of evidence, however, in conjunction with the other forms of evidence mentioned below.

c. If you determine that any of the following types of applicants need an Affidavit of Support to meet the public charge requirement, they may use Form I-134, as they are not authorized to use Form I-864 or I-864W:

(1) Returning resident aliens (SBs);

(2) Diversity visa applicants (DVs); and

(3) Fiancé(e)s (K1s or K3s)

d. The simple submission of Form I-134, Affidavit of Support, however, is not sufficient to establish that the beneficiary is not likely to become a public charge. Although the minimum income requirements of Form I-864, do not apply in such cases (e.g., the 125 percent minimum income amount which is only required by the I-864), you must make a thorough evaluation of other factors, such as:

(1) The sponsor's motives in submitting the affidavit;

(2) The sponsor's relationship to the applicant (e.g., relative by blood or marriage, former employer or employee, schoolmates, or business associates);

(3) The length of time the sponsor and applicant have known each other;

(4) The sponsor's financial resources; and

(5) Other responsibilities of the sponsor.

NOTE: When there are compelling or forceful ties between the applicant and the sponsor, such as a close family relationship or friendship of long standing, you may favorably consider the affidavit. On the other hand, an affidavit submitted by a casual friend or distant relative who has little or no personal knowledge of the applicant has more limited value. If the sponsor is not a U.S. citizen or lawful permanent resident (LPR), the likelihood of the sponsor's support of an immigrant visa (IV) applicant until the applicant can become self-supporting is a particularly important consideration.

e. The degree of corroborative detail necessary to support the affidavit will vary depending upon the circumstances. For example, for a relatively short-term visitor, little, if any, would be required. In immigrant cases, however, the sponsor's statement should include:

(1) Information regarding income and resources;

(2) Financial obligations for the support of immediate family members and other dependents;

(3) Other obligations and expenses; and

(4) Plans and arrangements made for the applicant's support in the absence of a legal obligation toward the applicant.

f. To substantiate the information regarding income and resources, the sponsor should attach to the affidavit a copy of the latest Federal income tax return filed prior to the signing of the Form I-134, including all supporting schedules. If you determine that the tax return and/or additional evidence in the file do not establish the sponsor's financial ability to carry out the commitment toward the immigrant for what might be an indefinite period of time, or there is a specific reason (other than the passage of time) to question the veracity of the income stated on the Form I-134 or the accompanying document(s), you should request additional evidence (i.e., statement from an employer showing the sponsor's salary and the length and permanency of employment, recent pay statements, or other financial data).

g. If the sponsor has a well-established business and submits a rating from a recognized business rating organization, you do not need to insist on a copy of the sponsor's latest income tax return or other evidence.

9 FAM 40.41 N5.6-4 Surety Bonds

(CT:VISA-1995; 06-06-2013)

a. In cases where the applicant appears to be otherwise unable to meet the public charge requirements, the U.S. sponsor may wish to post an indemnity bond pursuant to INA 213. Although the posting of a public charge bond does not, in itself, establish that an applicant is not likely to become a public charge, it might be sufficient, depending upon the circumstances in a particular case, to make possible a finding that the applicant overcomes INA 212(a)(4). The bond should be used sparingly and only in borderline cases. When an applicant appears likely on the facts to become a public charge (for example because of an acute physical condition and lack of adequate resources), the filing of a bond would not serve any purpose if the needs of the applicant would easily overcome the value of the bond.

b. The specifics of such a bond and the means of posting one are:

(1) The U.S. sponsor would file the Form I-352 with the Department of Homeland Security. Either a district director or, in some cases, a regional director, will then review the I-352.

(2) If a family is proceeding as a unit to the United States, a bond may be required for more than one member of the family. The I-352 should specify the name(s) of the person(s) for whom a bond is being requested. If only the principal applicant is immigrating immediately, the number of remaining family members should not be taken into account until they are applying for visas;

(3) A public charge bond is canceled when the alien dies, leaves the United States permanently, or is naturalized. The Department of Homeland Security/U.S. Citizenship and Immigration Services (DHS/USCIS) may, however, cancel a bond at any time if the alien has not become and does not appear likely to become a public charge five years after the entry into the United States. The bond will be reviewed for cancellation upon the filing of Form I-356, Request for Cancellation of a Public Charge Bond, if the alien has not become a public charge during those five years;

(4) You should inform the alien, in these cases, that DHS/USCIS may require a larger bond to be posted at the time of application for admission; and

(5) The visa issued in such cases must carry a notation that the bond was required and the notification (or a certified copy thereof) from DHS that the bond had been posted must be attached to the visa.

9 FAM 40.41 N5.7 Employment Considerations and the I-864

9 FAM 40.41 N5.7-1 Effect of Applicant's Own Employment in the United States

(CT:VISA-1995; 06-06-2013)

You may not consider an offer of employment to an applicant in place of a required Form I-864 in cases where the I-864 is required. You may consider the applicant's employment in determining whether the 125 percent minimum income requirement has been met in a visa case only if the beneficiary of Form I-864 has worked in the same job he or she will have after entry as an immigrant. Under these circumstances, the alien's income may be considered part of the sponsor's income. If the above criteria are met, and any of the applicant's family members will be accompanying him or her to the United States, the principal applicant in such cases may provide Form I-864-A, Contract between Sponsor and Household Member, on their behalf to help reach the additional income level that will be required.

9 FAM 40.41 N5.7-2 Information Contained on Approved Labor Certification

(CT:VISA-1995; 06-06-2013)

Only a small percentage of employment-based immigrants will require an I-864. See 9 FAM 40.41 N4.2 paragraph a(3). The majority of employment-based immigrants who do not require an I-864 have been offered prearranged employment and are immigrating based on that offer of employment. They are therefore subject to the labor certification requirement under INA 212(a)(5) (see 22 CFR 40.51 and 9 FAM 40.51 Notes.) You may assume, that in cases such as this, when a labor certification is granted, that the position is permanent and the prevailing wage has been met.

9 FAM 40.41 N6 COMPLETION OF THE FORM I-864

(CT:VISA-1995; 06-06-2013)

The purpose of Form I-864, Affidavit of Support under Section 213A of the Act is to:

(1) Create a legally binding contract between certain immigrant visa applicants, their sponsor(s) and the U.S. Government;

(2) Require an applicant to have sponsorship at 125 percent of the Federally determined poverty income guidelines (or 100 percent if the sponsor is an

active member of the U.S. Armed Forces, other than for training, and is sponsoring his or her spouse or child(ren));

(3) Ensure that newly-arrived aliens will be able to subsist for an extended period at a level above the poverty level; and

(4) Encourage immigrants to become and remain self-reliant, one of the oldest tenets of national immigration policy, and to provide the government with indemnification if they do not.

9 FAM 40.41 N6.1 The Affidavit of Support (AOS) Packet

(CT:VISA-1995; 06-06-2013)

a. The documents listed below make up the affidavit of support packet, normally sent to petitioners by the National Visa Center (NVC), which is designed to assist the sponsor's understanding and proper completion of the affidavit of support (AOS):

(1) Form I-864 or Form I-864-EZ, Affidavit of Support under Section 213A of the Act;

(2) Current Federal Poverty Guidelines Schedule, Form I-864-P;

(3) Form I-864-A, Contract Between Sponsor and Household Member;

(4) Form I-865, Sponsor's Notice of Change of Address; and

(5) Checklist for preparing Form I-864.

b. The National Visa Center (NVC) will include the checklist and other documents in the Instruction Package for Immigrant Visa Applicants, indicating the supporting documents which are required with Form I-864 or Form I-864-EZ. Posts may reproduce the checklist for local use and include it with Form I-864 or Form I-864-EZ that are distributed locally. Posts should also, when possible, make it available through Web sites and information units. Posts must maintain updated poverty guidelines and ensure that they are included with all AOS forms. NVC and posts should also make sponsors aware of the facts that their income must meet the poverty guidelines at the time of AOS filing with NVC or with post.

c. This documentation, supported by items listed in 9 FAM 40.41 N6.1, constitutes the primary (but not sole) evidence for establishing that the applicant is not inadmissible under INA 212(a)(4)(C) for those categories specified in 9 FAM 40.41 N4.2 above, and establishes the sponsor's income and, if need be, assets.

d. The validity of Form I-864 or Form I-864-EZ is indefinite from the time the sponsors and contributing household members have signed Form I-864, Form I-864-EZ and Form I-864-A. The AOS is based on the Federal Poverty Guidelines in effect at the time of its submission in support of an IV

application. 9 FAM 40.41 N6.4 describes circumstances in which additional documentation and/or consideration of income on the basis of the current poverty guidelines may be necessary at post. Newly issued poverty guidelines generally become effective for INA 213A affidavit purposes at the beginning of the second month after being published in the Federal Register (FR). However, you must review the text of the FR notice to determine the exact date on which new poverty guidelines become effective.

e. A sponsor may use the Form I-864-EZ in place of Form I-864 if he or she meets all of the following requirements:

(1) The sponsor is the visa petitioner (who filed the Form I-130, Petition for Alien Relative);

(2) The affidavit of support is filed on behalf of only one intending immigrant, who is the only person listed on the Form I-130;

(3) The sponsor is seeking to qualify based solely on his or her income from salary or pension (not on the basis of any other income or assets) as shown on the most recent Federal income tax return that the sponsor filed prior to the time of signing the Form I-864-EZ; and

(4) All of the sponsor's income is shown on one or more IRS Form W-2, Wage and Tax Statement to demonstrate employment income, and/or Form IRS-1099-MISC, Miscellaneous Income, to document pension income (except, in cases where the copy of the tax return is an IRS-generated transcript, a copy of the W-2 or 1099-MISC is not necessary). The Form I-864-EZ may not be filed if the sponsor will be submitting a Form I-864-A, if a joint sponsor will be required, or if the sponsor is an "alternative sponsor" who is substituting for the original sponsor, who has died (see 9 FAM 40.41 N6.3-1).

9 FAM 40.41 N6.2 Defining "Sponsor" for Purposes of the Affidavit of Support (AOS)

(CT:VISA-1995; 06-06-2013)

a. To qualify as a sponsor, an individual must be a natural person (not a corporation or other business entity) who:

(1) Is a citizen, national, or lawful permanent resident (LPR) of the United States (including conditional residents);

(2) Is at least 18 years of age;

(3) Filed the petition which forms the basis for the visa application (or has a substantial interest in the entity which filed the petition); and

(4) Is domiciled in any of the 50 States of the United States, the District of Columbia, or any territory or possession of the United States. (See 9 FAM 40.41 N7 for more on "domicile".)

b. If the petitioner does not meet the qualifying criteria to be a sponsor (for example, by being under 18 years of age or not domiciled in the United States), the visa applicant must be found ineligible for a visa under INA 212(a)(4) until such circumstance no longer exists.

c. The "sponsor" for purposes of the AOS is the petitioner; anyone else is either a joint or co-sponsor. All references to requirements for the "sponsor" or "sponsors" would apply not only to the petitioner sponsor, but also to any co-sponsor household members executing Form I-864-A and joint sponsors submitting a supplementary Form I-864.

9 FAM 40.41 N6.2-1 Petitioner Must Submit Form I-864 or Form I-864-EZ

(CT:VISA-1995; 06-06-2013)

If the I-864 is required (see 9 FAM 40.41 N4.2), the petitioner must submit Form I-864 or (if eligible) Form I-864-EZ. In other words, the petitioner must file the I-864 for all applicants contained in the petition. One original I-864 must be completed for each I-130 petition that was approved. For multiple dependent applicants off of one I-130 petition, only one original I-864 is needed for the principal applicant and the rest of the applicants may use photocopies of the I-864. This requirement is true even if the petitioner cannot meet the requirements outlined in 9 FAM 40.41 N6.2 or if the petitioner cannot meet the requirements imposed by the poverty guidelines. Such adverse circumstances would not necessarily mean that the applicant would be inadmissible under INA 212(a)(4), since a joint sponsor may be used to overcome the Federal poverty level income requirements. If a joint sponsor is used, the petitioner may not use Form I-864-EZ and must use Form I-864. (See 9 FAM 40.41 N9.) The petitioner must submit a Form I-864, even in the case of a following-to-join derivative beneficiary of the petition where the principal applicant has adjusted status in the United States. There are, however, two exceptions to the requirement of the petitioner completing Form I-864. (See 9 FAM 40.41 N6.3 and 9 FAM 40.41 N6.3-1 below for the exceptions.)

9 FAM 40.41 N6.2-2 Petitioner May Limit The Number of Applicants Sponsored

(CT:VISA-1995; 06-06-2013)

A petitioner may limit sponsorship to just the principal applicant and any dependents that will be traveling to the United States at the same time. By limiting the number of sponsored individuals, the petitioner will reduce the household size and thereby lower the income requirement. The petitioner could file another affidavit of support (AOS) on behalf of the other (following-to-join) dependents at a later date when the petitioner and the principal applicant have improved their financial situation. Alternatively, in cases that involve more than

one visa applicant, a petitioner may sponsor one or more immigrants and choose to use a joint sponsor for the remainder of the applicants, so as to comply with the poverty guidelines. Regardless, a Form I-864 would have to be executed by the petitioner for all applicants. Only then could a joint sponsor be used if needed.

9 FAM 40.41 N6.3 Sponsor When the Petitioner is a Business Entity

(CT:VISA-1995; 06-06-2013)

When the petitioner is a business entity, a U.S. citizen or lawful permanent resident (LPR) relative (defined at 8 CFR 213a.1 as a husband, wife, father, mother, child, adult son or daughter, or sibling) who has an ownership interest in the petitioning entity greater than 5%, the petitioner must submit Form I-864, Affidavit of Support under Section 213A of the Act. The alternative sponsor must be the U.S. citizen or lawful permanent resident (LPR) relative who filed the petition or has a significant ownership interest in the petitioning entity and he or she must meet the other criteria outlined in 9 FAM 40.41 N6.2.

9 FAM 40.41 N6.4 Substitute Sponsor When the Petitioner Has Died

(CT:VISA-1995; 06-06-2013)

a. INA Section 213A(f)(5)(B) now allows certain family members to become "substitute sponsors" if a visa petitioner dies following approval of the visa petition, but before the beneficiary obtains his or her permanent residence. If the visa petition was approved prior to the death of the petitioner, the Secretary of Homeland Security (DHS), may, in its discretion, reinstate the petition for humanitarian reasons, (8 CFR 205.1(a)(3)(i)(C)), and determine that the original sponsor's petition should not be revoked. (See 9 FAM 42.42 PN2.) The substitute or alternative sponsor must be the spouse, parent, mother-in-law, father-in-law, sibling, child (at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of the sponsored alien, or the legal guardian of the sponsored alien. The substitute or alternative sponsor must meet the other criteria outlined in 9 FAM 40.41 N6.2.

b. Eligibility of derivative applicants seeking to follow-to-join a principal applicant who has already acquired lawful permanent resident (LPR) status is dependent on the continuing LPR status of the principal, not on the status of the petitioner. Therefore, if the petitioner dies after the principal applicant has already become an LPR and one or more derivative applicants seek to follow to join the principal applicant, the derivatives retain eligibility to follow-to-join despite the death of the petitioner, and there is no need for reinstatement of the petition. In such circumstances, the derivative applicant seeking to follow-

to-join is inadmissible unless a substitute or alternative sponsor, as described in the paragraph above, executes a Form I-864 with respect to the derivative applicant. The substitute or alternative sponsor may not file a Form I-864-EZ.

9 FAM 40.41 N6.5 Supporting Evidence Which Must Be Submitted with Form I-864

(CT:VISA-1995; 06-06-2013)

a. The sponsor(s) must provide the following documentation to satisfactorily complete Form I-864, Affidavit of Support under Section 213A of the Act:

(1) Sponsor's Federal income tax returns for the most recent tax year:

(a) Each sponsor must submit with Form I-864 a photocopy or Internal Revenue Service (IRS)-generated transcript of the most recent income tax return that the sponsor had filed prior to the time of the AOS signing. A person may obtain a free IRS-generated transcript by filing IRS Form 4506-T (Form IRS-4506-T), Request for Transcript of Tax Return. Ordinarily, the sponsor's signature on Form I-864 is sufficient to qualify the photocopy or transcript as a "certified" copy. In those cases where you question the submitted tax return or transcript, you may require the sponsor to submit an IRS-certified copy of the tax return.

(b) A person obtains an IRS-certified copy by submitting form IRS-4506, Request for Copy of Tax Return, and paying the requisite filing fee. In such cases, you should generally require that the sponsor have the IRS-certified copy sent directly to post by the IRS. The sponsor should ask the IRS to include the applicant's name and case number on the form so that it can be readily attached to the correct file upon receipt at post. You may not require IRS-certified copies of tax returns of all sponsors prior to review of the submitted tax return. IRS-certified copies may only be required on a case-by-case basis when you question the validity of the submitted tax return.

(c) Failure to file a required income tax return does not excuse the sponsor from the requirement for tax returns as supporting documents. If a tax return should have been filed, the affidavit will not be considered sufficient until the sponsor has done so and supplied the appropriate copies for consideration with Form I-864, Affidavit of Support under Section 213A of the Act. If the income requirement cannot be met, but the sponsor claims to have under-reported his or her income, an amended return will be necessary.

NOTE: You do not have the authority to require an individual to pay taxes or correctly report income. You may, however, advise applicants or sponsors that an original or amended tax return will be required in order to process the immigrant visa (IV) application to conclusion.

(d) If a photocopy of a tax return provided by the sponsor lists income that should have been reflected in a Form W-2, Wage and Tax Statement, or Form IRS-1099-MISC, Miscellaneous Income, but such form was not submitted to post with the tax return and Form I-864, you should consider the record, taken as a whole, and determine whether it establishes that information on the tax return is true and correct. If you conclude that the information is true and correct, it is not necessary to require a copy of the Form W-2 or Form IRS-1099-MISC. Further, in cases where the copy of the tax return is an IRS-generated transcript, it is not necessary to require a copy of the Form W-2 or Form IRS-1099-MISC.

(2) Tax returns of other household members: If the sponsor is relying on income from any household member or dependents (as defined at 9 FAM 40.41 N8.1 below) to reach the minimum income requirement, an IRS transcript or a copy of each such individual's most recent tax return is also required, and each such person must complete a Form I-864-A, Contract Between Sponsor and Household member;

(3) Employment evidence:

(a) Except as provided in 9 FAM 40.41 N6.5 paragraph a(3)(c) and (d), below, if the information on the Affidavit of Support (AOS) and tax return establish that the sponsor's current income meets or exceeds the poverty guidelines for the year the sponsor submitted Form I-864 in support of the Immigrant Visa (IV) application, either by submitting to NVC directly or to post at the time of application, you must determine that Form I-864 is sufficient without requesting any further evidence. (See 9 FAM 40.41 Exhibit I, Poverty Income Guidelines.)

(b) If the AOS or tax return reflects income below the poverty guidelines for the year Form I-864 was submitted, you should request additional evidence of:

(i) Current employment or self-employment; and

(ii) Recent pay statements, a letter from the employer on business letterhead - showing dates of employment, wages paid, and type of work performed - or other financial data.

If the sponsor with income below the poverty guidelines is unemployed or retired, you should request evidence of ongoing income from other means, such as retirement benefits, other household members' income, or other significant assets.

(c) You should request additional evidence (i.e., employment letter, recent pay statements, or other financial data) only if there is a specific reason (other than the passage of time) to question the veracity of the income stated on Form I-864 or the accompanying document(s).

(d) If you determine either that the tax return and/or additional evidence

in the file do not establish that the sponsor meets the poverty guidelines in effect at the time Form I-864 was filed, or that the facts of the case, as supported by evidence in the record, provide a specific reason other than the passage of time for questioning whether the sponsor's income information is accurate or still meets the guidelines, you should request current year income information. In this situation, the sufficiency of Form I-864 is determined based upon the additional evidence as it relates to the applicable poverty guidelines for the current year, rather than the poverty guidelines for the calendar year in which the sponsor signed Form I-864.

(4) Evidence of Sponsorship Eligibility–Evidence to establish eligibility as a sponsor, including citizenship or lawful permanent resident (LPR) status, age, and domicile (as defined in 9 FAM 40.41 N6.2).

b. Tax-free income (such as a housing allowance for clergy or military personnel) and other tangible benefits in lieu of salary are considered income. The sponsor bears the burden of proving the nature and amount of income.

c. Assembling the documents is the sponsor's responsibility. If Form I-864, Affidavit of Support under Section 213A of the Act, and supporting documents are incomplete or poorly assembled, the post must refuse the applicant under INA 221(g) and return the entire package to the applicant with a copy of the checklist. However, you should no longer refuse applicants under INA 221(g) just for failing to provide the three most recent federal tax returns.

d. For more information on what is required on the I-864, you may refer to the instructions which accompany the Form I-864 itself.

9 FAM 40.41 N6.6 Evidence of Additional Assets

(CT:VISA-1995; 06-06-2013)

a. The Form I-864 does not require sponsors to submit evidence of assets, if income alone is sufficient to meet the minimum Federal poverty guidelines income requirement described in 9 FAM 40.41 N6 paragraph (2). The mere fact that the petitioner and/or sponsor has met the minimum requirement, however, does not preclude a finding of inadmissibility under INA 212(a)(4). You may request evidence of assets and liabilities, if such information is necessary to determine the applicant's eligibility. If a sponsor or joint sponsor uses assets to prove the ability to support the sponsored immigrant, he or she may not use the Form I-864-EZ.

b. The sponsor or joint sponsor may include his or her assets (and offsetting liabilities), and/or the assets of any household members signing Form I-864-A, as income to make up any shortfall toward meeting the Federal poverty guidelines. The assets (bank accounts, stock, other personal property, real estate) must be available in the United States for the applicant's support and must be readily convertible to cash within one year. In most cases, the

sponsor must present evidence as described in 9 FAM 40.41 N5.6-2, establishing location, ownership and value of each asset listed, including liens and liabilities for each asset listed. The combined cash value of all the assets (i.e., the total value of the assets less any offsetting liabilities) must total at least five times the difference between the total household income and the minimum Federal poverty income requirement.

c. Sponsors of immediate relative spouses and children of U.S. citizens, however, must only show a combined cash value of assets in the amount of three times the difference between the poverty guideline and actual household income. In addition, sponsors of alien orphans who will acquire citizenship after admission to the United States need only prove a combined cash value of assets in the amount of the difference between the poverty guideline and actual household income.

d. Sponsors of alien orphans who will acquire citizenship after admission to the United States based upon either adoption in the United States subsequent to admission, or a need to obtain formal recognition of a foreign adoption under the law of the State of proposed residence because at least one of parents did not see the child before or during the foreign adoption, need only prove a combined cash value of assets in the amount of the difference between the poverty guidelines and actual household income.

e. If assets of the sponsored applicant are being used in such a fashion, the sponsored applicant is not required to submit Form I-864-A, but must show the same kinds of evidence as described in and show that the assets can be converted into cash within one year.

9 FAM 40.41 N6.7 Definition of Income

(CT:VISA-1995; 06-06-2013)

"Income", for the purpose of Form I-864, means the total unadjusted income as shown on the tax return, before deductions. Total unadjusted income includes not only salary (if any) but also monetary gains from any other source, such as rent, interest, dividends, etc.

9 FAM 40.41 N7 "DOMICILE" AND THE FORM I-864

9 FAM 40.41 N7.1 Definition Of Domicile

(CT:VISA-1995; 06-06-2013)

For the purposes of INA 213A, "domicile" means:

(1) The place where a sponsor has his or her principal "residence" (as defined

in INA 101(a)(33) as the place of general abode in fact, without regard to intent.) in the United States, with the intention to maintain that residence for the foreseeable future. Domicile is further defined as the sponsor's actual, principal dwelling place. See 8 CFR section 213a.1

(2) A legal permanent resident alien (LPR) living abroad temporarily is considered to have a domicile in the United States, if he or she has already applied for and obtained the preservation of residence benefit under INA 316(b) or INA 317.

(3) A U.S. citizen living abroad whose employment meets the requirements of INA 319(b)(1) is considered to be domiciled in the United States.

9 FAM 40.41 N7.1-1 Maintaining U.S. Domicile While Living Abroad Temporarily

(CT:VISA-1995; 06-06-2013)

a. Unless the petitioner meets the conditions outlined in 9 FAM 40.41 N7.1-2 below, a petitioner who is maintaining a principal residence outside the United States could not normally claim a U.S. domicile and would be ineligible to submit Form I-864. In order to provide an AOS for his or her relative, such a petitioner would have to reestablish a domicile in the United States. (See 9 FAM 40.41 N7.1-3, below.)

b. However, in a situation in which the petitioner has maintained both a U.S. residence and a residence abroad, you must determine which is the principal abode. Some petitioners have remained abroad for extended periods but still maintain a principal residence in the United States (i.e., students, contract workers, and non-governmental organization (NGO) volunteers). To establish that one is also maintaining a domicile in the United States, the petitioner must satisfy you that he or she:

(1) Departed the United States for a limited, and not indefinite, period of time;

(2) Intended to maintain a U.S. domicile at the time of departure; and,

(3) Can present convincing evidence of continued ties to the United States.

9 FAM 40.41 N7.1-2 Establishing the Existence of a U.S. Domicile

(CT:VISA-1995; 06-06-2013)

a. A petitioner living abroad not meeting the criteria in 9 FAM 40.41 N7.1-1 who wishes to qualify as a sponsor must satisfy you:

(1) That he or she has taken steps to establish a domicile in the United States;

(2) That he or she has either already taken up physical residence in the United States or will do so concurrently with the applicant;

(3) The sponsor does not have to precede the applicant to the United States but, if he or she does not do so, he or she must at least arrive in the United States concurrently with the applicant;

(4) The sponsor must establish an address (a house, an apartment, or arrangements for accommodations with family or friend) and either must have already taken up physical residence in the United States; or

(5) Must at a minimum to satisfy you that he or she intends to take up residence there no later than the time of the applicant's immigration to the United States.

b. Although there is no time frame for the resident to establish residence, you must be satisfied that the sponsor has, in fact, taken up principal residence in the United States. Evidence that the sponsor has established a domicile in the United States and is either physically residing there or intends to do so before or concurrently with the applicant may include the following:

(1) Opening a bank account;

(2) Transferring funds to the United States;

(3) Making investments in the United States;

(4) Seeking employment in the United States;

(5) Registering children in U.S. schools;

(6) Applying for a Social Security number; and

(7) Voting in local, State, or Federal elections.

c. If a petitioner cannot satisfy the domicile requirement, the petitioner fails to qualify as a "sponsor" for the purposes of submitting Form I-864, and a joint sponsor cannot be accepted and the applicant must be refused pursuant to INA 212(a)(4). Without a properly executed I-864, signed by a sponsor (the petitioner) who is "domiciled" in the United States, in visa cases which require an I-864, then an immigrant visa cannot be approved.

9 FAM 40.41 N7.1-3 U.S. Domicile and Employment-Based Preference Applicants

(CT:VISA-1995; 06-06-2013)

As discussed in 9 FAM 40.41 N4.2 certain employment-based immigrant visa applicants who are petitioned for by U.S. citizen or permanent resident alien relatives or by entities in which such a relative has an ownership interest of more than 5% are required to submit a Form I-864. However, DHS/USCIS has determined that Congress did not intend to impose this requirement on a petitioning relative, or a relative with a substantial interest in a business enterprise who is not a U.S. citizen or a lawful permanent resident (LPR) and is not domiciled

in the United States. Therefore, in cases where these petitioners do not have a U.S. domicile, an I-864 is not required.

9 FAM 40.41 N7.2 Employment Abroad Meeting Requirements of INA 319(b)(1)

(CT:VISA-1995; 06-06-2013)

Certain petitioners who are living abroad temporarily are considered to be domiciled in the United States if their employment meets the requirements of INA 319(b)(1) (8 U.S.C. 1430(b)(1)). That section requires, for qualifying "employment abroad," that the individual be in the employ of:

(1) The U.S. Government;

(2) A U.S. institution of research recognized as such by the Secretary of Homeland Security (DHS) (see 8 CFR 316.20 for the list of institutions);

(3) A U.S. firm or corporation engaged in whole or in part in the development of foreign trade and commerce with the United States or a subsidiary thereof;

(4) A public international organization in which the United States participates by treaty or statute;

(5) A religious denomination having a bona fide organization in the United States, if the individual concerned is authorized to perform the ministerial or priestly functions thereof; and

(6) A religious denomination or an interdenominational mission organization having a bona fide organization in the United States, if the person concerned is engaged solely as a missionary.

9 FAM 40.41 N8 "HOUSEHOLD MEMBERS" ON THE FORM I-864

9 FAM 40.41 N8.1 Definition of Household Member

(CT:VISA-2002; 06-18-2013)

All household members must be included on the Form I-864. Household members for determining the applicable Federal poverty line levels and all other associated purposes include:

(1) The sponsor; (see 9 FAM 40.41 N6.4);

(2) The sponsor's spouse; and the sponsor's children by birth, marriage, or adoption living in the sponsor's residence;

(3) Any other dependents of the sponsor (if identified as such on the sponsor's

Federal income tax return for the most recent year, regardless of whether they are related to the sponsor or have the same principal address as the sponsor);

(4) Any immigrants previously sponsored using Form I-864, Affidavit of Support under Section 213A of the Act, if the obligation has not terminated;

(5) Family members immigrating at the same time or within six months of the principal immigrant listed in the chart in Part 3 of Form I-864; and

(6) *The sponsor's nondependent siblings, parents, or adult children who reside* in the sponsor's household, if they complete a Form I-864-A, Contract Between Sponsor and Household Member.

9 FAM 40.41 N8.2 Use of Form I-864-A By a Sponsor and a Household Member

(CT:VISA-1995; 06-06-2013)

a. In cases in which the sponsor's individual income does not meet or exceed the level which is required by the Poverty Guidelines, a Form I-864-A, Contract between Sponsor and Household Member, may be submitted by any household member who is willing for his or her income to be used by the sponsor to meet the guidelines. The primary sponsor must include the names of these individuals and their contributions on his or her Form I-864..

b. Under Form I-864-A, the household member agrees to provide as much financial assistance as may be necessary to enable the sponsor to maintain the sponsored immigrant(s) at the required annual income level. The household member will be legally liable for any reimbursement obligations that the sponsor may incur.

9 FAM 40.41 N8.3 Use of Form I-864-A By a Sponsor and a Principal Applicant

(CT:VISA-1995; 06-06-2013)

a. If the sponsored immigrant (the principal applicant) has accompanying family members and the sponsor seeks to rely on the sponsored immigrant’s (principal applicant’s) continuing income in the United States to establish the sponsor’s ability to support the accompanying family members, the sponsored immigrant must sign Form I-864-A, Contract between Sponsor and Household Member. However, income shown in a sponsored immigrant’s Form I-864-A cannot be based on an offer of employment that has not yet been effected. (See 9 FAM 40.41 N5.6 above.)

b. If the sponsored immigrant does not have accompanying family members, he or she cannot submit Form I-864-A. His or her income may be counted in the

household income, however, if he or she will continue to work in the same job after he or she immigrates to the United States. You may request evidence of the applicant's income such as pay statements and tax returns, if he or she was required to file them, and should request a letter from the employer certifying that the employment will continue after the applicant's immigration to the United States.

9 FAM 40.41 N9 DEFINING "JOINT SPONSOR"

(CT:VISA-1995; 06-06-2013)

a. A "joint sponsor" is one who is not the petitioner for the sponsored immigrant but who otherwise meets the citizenship, residence, age, and household income requirements, as set forth in 9 FAM 40.41 N6.2, and has executed a separate Form I-864, Affidavit of Support Under Section 213A of the Act, on behalf of the intending immigrant. The joint sponsor differs from a "household member" in that the joint sponsor can be a friend or a non-relative who does not reside in and is not necessarily financially connected with the sponsor's household. If a petitioner or sponsor meets the minimum income requirements, no joint sponsor may submit Form I-864 unless you specifically require it.

b. Two joint sponsors can be used per family unit intending to immigrate based upon the same petition. No individual may have more than one joint sponsor, but it is not necessary for all family members to have the same joint sponsor. If two joint sponsors are used, each joint sponsor is responsible only for the intending immigrant(s) listed on the joint sponsor's Form I-864.

c. A joint sponsor is jointly and severally liable with petitioning sponsor and any household members who have signed a Form I-864-A. He or she must individually meet the minimum income requirements as set forth above. Anyone outside the petitioner's household may be considered a joint sponsor. Joint sponsors may include the income and assets of members of their own household and dependents to meet the income requirement.

d. In the event a sponsor has died before all family members have followed to join the principal, a joint sponsor is permitted to execute a Form I-864. In such a case, there is no requirement that you must request a joint sponsor. The new sponsor may submit a Form I-864, regardless of the status of the deceased petitioner's estate.

9 FAM 40.41 N10 LEGAL OBLIGATIONS OF SPONSORS

(CT:VISA-1995; 06-06-2013)

a. The execution of Form I-864 creates a legally-binding contract between the sponsor(s) (including any household members who have executed Form I-864-

A and any joint sponsor), and any Federal, State, local, or private entities that provide means-tested public benefits (SSI, TANF, etc.) throughout the duration of the contract. See 9 FAM 40.41 N11. By executing Form I-864, the sponsor agrees to:

(1) Provide financial support necessary to maintain the sponsored immigrant at an income that is at least 125 percent of the Federal poverty guidelines for the indicated family size (see 9 FAM 40.41 Exhibit I, Poverty Income Guidelines); and

(2) Reimburse any agencies that provide means-tested benefits to a sponsored alien.

b. In most cases, an alien is not eligible to receive any Federal benefits during his or her first five years in the United States. Although the alien may obtain public benefits thereafter, disbursing entities may seek reimbursement from the alien's sponsor for certain means-tested benefits received by the alien, for the duration of the validity of the affidavit of support. In the event that petitioner's Form I-864 does not meet the minimum Federal poverty guideline amount and a joint sponsor is necessary, the petitioner is still responsible for any amount of income or assets included in his or her Form I-864.

9 FAM 40.41 N10.1 Duration of Sponsors' Obligation Under Form I-864

(CT:VISA-1995; 06-06-2013)

Sponsors, joint sponsors, and household members (who have executed Form I-864, or Form I-864-A) are bound by the contract terms until the applicant:

(1) Is naturalized;

(2) Has worked, or can be credited with, 40 qualifying quarters of work;

(3) Leaves the United States permanently; or

(4) Dies.

9 FAM 40.41 N10.2 Death of a Sponsor

(CT:VISA-1995; 06-06-2013)

In the event that a sponsor dies, the sponsor's estate remains liable for the duration of the contract. If the sponsor dies after the principal applicant has immigrated, but before the qualified family members who are following to join have immigrated, the applicants must get another sponsor, although no new petition need be filed. If the principal applicant can meet the requirements to be a sponsor, he or she may submit Form I-864 for his or her family members. Also see 9 FAM 40.41 N6.4, Substitute Sponsor When the Petitioner Has Died.

9 FAM 40.41 N11 "MEANS-TESTED" BENEFITS

(CT:VISA-1995; 06-06-2013)

a. During the life of the I-864 contract, a sponsor is liable for "means-tested benefits" received by the visa applicant. Federal, State, and local agencies will define which benefits are "means-tested" and whether they wish to seek reimbursement.

b. The agency supplying the means-tested benefit must have designated the program as such prior to the sponsor's submission of Form I-864, for expenses relating to that benefit to be reclaimable from the sponsor. Moreover, the agency must request reimbursement. In the absence of such a request, the sponsor is not liable.

c. It must be noted, moreover, that the participation of an applicant or sponsor in a supplemental program is not to be considered in a "public charge" determination. Only those programs that are paid in cash and are the primary source of the alien's income should be considered as part of the Consular Officer's assessment of the "totality of the circumstances" for that alien when making an INA 212(a)(4)(A) determination.

d. As the Department of State has no role with respect to designating means-tested benefits or with reimbursement, any question regarding whether a benefit should be considered a means-tested benefit is outside the scope of your inquiry into an applicant's eligibility for a visa.

9 FAM 40.41 N12 PUBLIC CHARGE CONSIDERATION IN NONIMMIGRANT CASES

9 FAM 40.41 N12.1 Nonimmigrants and INA 212(a)(4)

(CT:VISA-1995; 06-06-2013)

a. All nonimmigrants, except those mentioned in 9 FAM 40.41 N3 above, must overcome the public charge presumption.

b. Additionally, since INA 212(a)(4) can be overcome by a non-immigrant or immigrant visa applicant at any time, if an applicant cannot overcome INA 214(b), you should not expend resources on pursuing a possible INA 212(a)(4) ineligibility.

c. In determining admissibility under INA 212(a)(4), you must be aware of the differences in the requirements imposed on a would-be immigrant as opposed to a nonimmigrant applicant. The amount and type of evidence generally required in an immigrant visa case is much greater than that which is required in a nonimmigrant visa case. Evidence that establishes the applicant is entitled to a nonimmigrant classification is generally sufficient to meet the requirements

of INA 212(a)(4), absent evidence that gives you reason to believe that a public charge concern exists.

9 FAM 40.41 N12.2 Additional Evidence of Support in Nonimmigrant Visa Cases

(CT:VISA-1995; 06-06-2013)

a. Extensive inquiry into the question of the possible public charge inadmissibility of a nonimmigrant visa (NIV) applicant should be rare if the alien is otherwise qualified for the visa category for which the alien has applied. Ordinarily, a nonimmigrant visa applicant would be required to provide evidence on the question of public charge only when there are clear indications, based on the usual evidence required to support the application, that the alien does not have sufficient resources to sustain assistance.

b. However, if the evidence of nonimmigrant status submitted does not indicate adequate provision for the applicant's support while in the United States and for the return abroad, you may request specific financial evidence. Such evidence may take the form of a letter of invitation, Form I-134, Affidavit of Support, from a sponsor that clearly indicates the sponsor's willingness to act in such capacity and the extent of financial responsibility undertaken for the applicant, or a public charge bond (see 9 FAM 40.41 N12.7).

c. Unless you are satisfied that the sponsor's financial position is sound, the affidavit of support (AOS) should contain evidence of the sponsor's ability to carry out the commitment. Such AOS's for NIV are not legally-binding contracts, and it is at your discretion to determine if such evidence would assist a nonimmigrant alien in overcoming a finding of inadmissibility because of the likelihood of becoming a public charge after entering the United States. If the applicant is proceeding to the United States for a brief visit, the presentation of evidence of the sponsor's financial condition may not be necessary.

9 FAM 40.41 N12.3 Unwarranted Requirements

(CT:VISA-1995; 06-06-2013)

Under U.S. law, no individual can make binding assertions about another person's possible future actions. If you determine that a Form I-134 is necessary, the sponsor (meaning the individual who has completed the Form I-134) is not required to declare that the applicant will neither seek nor accept employment in the United States nor apply for permanent residence. Under certain circumstances, nonimmigrants are permitted to work or, if not permitted to work at the time of admission, they may be permitted to work after their nonimmigrant classification has been changed under INA 248. Moreover, a nonimmigrant in the United States is entitled to apply for adjustment of status under INA 245 if eligible therefore.

9 FAM 40.41 N12.4 Alien's Government Requiring Evidence of Support

(CT:VISA-1995; 06-06-2013)

Some foreign governments require their nationals to present evidence of support from a U.S. sponsor prior to the issuance of a passport or exit permit. Such documentation is usually required in the form of an AOS guaranteeing that, while in the United States, the alien will not become a burden on the applicant's country. Consular officers who are serving in a country with this requirement should not automatically require all aliens applying for visas to submit a copy of the support evidence submitted to the alien's government. However, in some instances, you may decide such evidence would be advisable.

9 FAM 40.41 N12.5 Aliens Seeking Admission for Medical Treatment

(CT:VISA-1995; 06-06-2013)

If the personal resources of an applicant seeking admission to the United States for medical treatment are not sufficient or are unavailable for use outside the country of residence, you may decide to request a sponsorship affidavit. The affidavit should include explicit information regarding the arrangements made for the alien's support, medical care, and, if applicable, assurance that a bond will be posted if required by the DHS/USCIS.

9 FAM 40.41 N12.6 Alien Seeking Admission as K Nonimmigrant

(CT:VISA-1995; 06-06-2013)

Since K-1 (fiancé(e) of a U.S. citizen) and K-2 (child of the fiancé(e) of a U.S. citizen), K-3 (spouse of U.S. citizen), and K-4 (child of K-3) applicants are technically applying for nonimmigrant visas (NIV), they must use Form I-134, Affidavit of Support, if you determine that a Form I-134 is necessary. You must not require or accept Form I-864 in K visa cases. Such applicants will, however, have to submit Form I-864, to the DHS/USCIS at the time of adjustment of status to that of a lawful permanent resident (LPR). Also see 9 FAM 40.41 N4.4-3.

9 FAM 40.41 N12.7 Surety Bonds and Non-Immigrant Visa Applicants

(CT:VISA-1995; 06-06-2013)

In cases where the applicant is otherwise eligible, including under INA 214(b), the procedures for posting bond for non-immigrant visas (NIVs) are the same as those for immigrant visas (IV). (See 9 FAM 40.41 N5.6-4.)

9 FAM 40.41 N13 INA 221(G) VS. INA 212(A)(4) REFUSALS

(CT:VISA-1995; 06-06-2013)

The determination of whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by whether or not you have decided that you have enough information to make a finding of whether the applicant is ineligible under INA 212(a)(4).

(1) For example, if Form I-864 is submitted without this year's tax returns, then this is a documentary problem; the refusal should be INA 221(g).

(2) On the other hand, if the AOS is technically complete, but does not reflect sufficient financial resources, even after any possible joint sponsors have submitted an AOS then that is a substantive problem and you must refuse the visa under INA 212(a)(4).

(3) You should note that immigrant visa applications refused under INA 212(a)(4), unlike those refused under INA 221(g), are not subject to termination under INA 203(g).